Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

VICTORIA TCHOUKHROVA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, in the first instance and without prior resolution of the question by the Attorney General, that a parent may qualify for asylum and withholding of removal based solely on alleged persecution of her child.

2. Whether the court of appeals erred in resolving all of the remaining issues in the case rather than remanding them to the Attorney General for further consideration.

PARTIES TO THE PROCEEDING

The petitioner in this Court is the Attorney Genera of the United States, Alberto R. Gonzales. The respondents are Victoria Tchoukhrova, Dimitri Tchoukhrova and Evgueni Tchoukhrova, who were petitioners in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, Alberto R. Gonzales, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 404 F.3d 1181. The order of the court of appeals denying the petition for rehearing (Pet. App. 41a-51a) is reported at 430 F.3d 1222. The order of the Board of Immigration Appeals (Pet. App. 28a-29a), and the decision of the immigration judge (Pet. App. 30a-40a), are unreported.

JURISDICTION

The court of appeals entered its judgment on April 21, 2005. A petition for rehearing was denied on December 5, 2005. On February 23, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 4, 2006. On March 27, 2006, Justice Kennedy further extended the time for filing a petition for a writ of certiorari to and including May 4, 2006. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the separately bound appendix to this petition at 52a-55a.

STATEMENT

In this case, the Ninth Circuit held that respondent Victoria Tchoukhrova qualified as a "refugee" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, based exclusively on persecution allegedly suffered not by her, but by her child. The court then held that Tchoukhrova could accord derivative asylum and withholding of removal back to her child and to her spouse. In addition, the court decided de novo that the government could not rebut a presumption of a well-founded fear of future persecution that arose only after the court found past persecution on the basis of its new imputation rule. In so doing, the Ninth Circuit acknowledged that neither the derivative eligibility nor the future persecution question had been decided by the immigration judge or the Board of Immigration Appeals. Nevertheless, the court definitively resolved those ques-

tions rather than remanding, as required by *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam).

This Court recently reconfirmed the erroneousness of the Ninth Circuit's approach, reiterating that courts of appeals may not raise and resolve questions of immigration law that have not been addressed by the Attorney General, and summarily reversing an en banc decision of the Ninth Circuit that ignored that principle. *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006) (per curiam). The court of appeals' commission here of the same error it made in *Thomas* and *Ventura* on questions of immigration law that are of substantial and potentially far-reaching importance merits the same summary disposition as *Thomas* and *Ventura*, or, at a minimum, a vacatur and remand in light of *Thomas*.

1. a. Congress has charged the Secretary of Homeland Security (Secretary) "with the administration and enforcement of [the Immigration and Nationality Act] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. 1103(a)(1) (2000 & Supp. II 2002), as amended by the Homeland Security Act Amendments of 2003, Pub. L. No. 108-7, Div. L, § 105(1), 117 Stat. 531. Congress vested the Secretary with the authority to make asylum determinations for aliens who are not in removal proceedings. 6 U.S.C. 271(b)(3) (Supp. II 2002); see also 8 C.F.R. 208.2(a), 208.4(b), 208.9(a).

The Attorney General is responsible for conducting the adjudication of admininstrative removal proceedings against an alien charged by the Department of Homeland Security with being removable. 8 U.S.C. 1101(a)(1), 1229a(a)(1). Removal hearings are conducted by immigration judges in the Executive Office for Immigration

Review within the Department of Justice, and the Board of Immigration Appeals (Board) hears appeals from decisions of the immigration judges. See 8 C.F.R. 1003.1, 1240.1(a)(1), 1240.15. The Attorney General has the authority to review any decision of the Board. 8 C.F.R. 1003.1(h).

b. An alien may be granted asylum, in the Attorney General's discretion, if "the Attorney General determines that such alien is a refugee," and the "alien * * * has applied for asylum in accordance with the requirements and procedures established by the Attorney General." 8 U.S.C. 1158(b)(1)(A), as amended by the REAL ID Act, Pub. L. No. 109-13, Div. B, § 101(a), 119 Stat 302. The INA defines a "refugee" as a person who is unwilling or unable to return to his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). In addition to discretionary asylum, mandatory withholding of removal from a particular country is available if the alien's "life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A) (Supp. II 2002).

For purposes of both forms of protection from removal, "persecution" refers to the infliction of significant mistreatment by either the government of the applicant's country of origin or by groups or individuals whom the government is unable or unwilling to control. See *In re Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990); *In re Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985), overruled in part on other grounds by *In re Mogharrabi*, 19

I. & N. Dec. 439 (BIA 1987). "Discrimination * * * as morally reprehensible as it may be, does not ordinarily amount to 'persecution' within the meaning of the [INA]." *Ghaly* v. *INS*, 58 F.3d 1425, 1431 (9th Cir. 1995). "[M]ere 'repugnance of . . . a governmental policy to our own concepts of . . . freedom' [is] not sufficient to justify labelling that policy as persecution." *Fatin* v. *INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (Alito, J.) (quoting *Blazina* v. *Bouchard*, 286 F.2d 507, 511 (3d Cir.), cert. denied, 366 U.S. 950 (1961)).

c. Regulations adopted by the Attorney General generally require an individual's eligibility for refugee status to be established based on persecution that is specific to and directed at that individual. For example, the applicant must prove that "*he or she* has suffered past persecution or * * * has a well-founded fear of future persecution." 8 C.F.R. 1208.13(b), (b)(1) and (2)(i)(A) (emphasis added). Furthermore, "well-founded fear" is defined in terms of the fear of the applicant. 8 C.F.R. 1208.13(b)(2)(i)(A)-(C). A presumption of a well-founded fear of future persecution arises if the applicant establishes that "*he or she* has suffered persecution in the past," 8 C.F.R. 1208.13(b)(1) (emphasis added), and the presumption may be rebutted by showing "a fundamental change," 8 C.F.R. 1208.13(b)(1)(i)(A), in the applicant's "personal circumstances" or in country conditions, *Asylum Procedures*, 65 Fed. Reg. 76,127 (2002). The presumption may also be rebutted by showing that "the applicant" could avoid future persecution by relocating to another part of his or her country. 8 C.F.R. 1208.13(b)(1)(i)(B).

Similarly, to be eligible for withholding of removal, "the applicant" must prove that "*his or her* life or free-

dom would be threatened," meaning it is more likely than not that "*he or she* would be persecuted." 8 C.F.R. 1208.16(b)(1) and (2) (emphases added). If "the applicant" is found to have experienced past persecution, there is a presumption of a future threat to life or freedom. 8 C.F.R. 1208.16(b) (1)(i)(A)-(B). As in asylum cases, this presumption can be rebutted if there is either "a fundamental change in circumstances" or "[t]he applicant" could relocate elsewhere in his or her country to avoid future persecution. *Ibid.*

Congress has created one exception to the requirement of individualized persecution. Derivative asylum permits a "spouse or child * * * of an alien who is granted asylum" to be "granted the same status as [that] alien if accompanying, or following to join such alien." 8 U.S.C. 1158(b)(3)(A) (Supp. II 2002). The Attorney General, through regulations, has hewed to Congress's terms and has limited derivative asylum to only the "spouse" or "child" of the persecuted individual, and has expressly precluded derivative asylum based on all other familial relations, including status as a "parent." 8 C.F.R. 1208.21(a)-(g); 8 C.F.R. 207.7(b)(6). Neither Congress nor the Attorney General has recognized any form of derivative relief for withholding of removal.

2. Victoria Tchoukhrova is a female native of Russia who, in 2001, applied for asylum as the principal applicant, with her spouse and son as derivative asylum applicants only. Pet. App. 31a, 51a-52a; Admin. Rec. 73-74 (Tr. 7-8); Gov't C.A. Br. 4. She asserted persecution on the basis of political opinion due to her opposition to Russia's lack of equal and mainstreamed treatment for persons with disabilities. See Pet. App. 6a, 8a.

Tchoukhrova's son, Evgueni, was born with cerebral palsy. Pet. App. 2a. Over the parents' objection, Russian officials transferred the infant to a government hospital for children with birth defects. Admin. Rec. 95 (Tr. 28). Evgueni's parents later procured his release and placed him in a private hospital. *Id.* at 100 (Tr. 33); see Pet. App. 3a-4a. When Evgueni was one year old, his personal pediatrician in a government hospital diagnosed him with infantile cerebral palsy. Admin. Rec. 100-101 (Tr. 33-34).

In 1994, Victoria Tchoukhrova traveled to the United States to obtain specialized treatment for Evgueni at an osteopathic center that had been recommended to her by a private clinic in Vladivostok. Admin. Rec. 144 (Tr. 77). Upon their return to Russia, the parents chose not to have Evgueni vaccinated, based on the advice of a doctor at the American osteopathic clinic. The Russian government continued to provide medical treatment to Evgueni, but, apparently, his parents' opposition to having him vaccinated made it more difficult for him to obtain medical care within state-run medical facilities. Evgueni was also denied access to public schools due to his cerebral palsy. Pet. App. 4a, 35a. Russian officials, instead, provided him with a visiting teacher. Admin. Rec. 333.

At the hearing before an immigration judge, Victoria Tchoukhrova testified that, because of "societal prejudice against the disabled in Russia," Pet. App. 5a, Evgueni was subjected to comments and the reactions of private individuals based on uninformed fears or misconceptions about cerebral palsy. She also discussed two incidents, not mentioned in her asylum application, that caused injuries when the boy was six years old. *Ibid.* In

one incident, several men grabbed Evgueni in a park and started dragging him toward a lake. When Victoria ran toward them, they dropped Evgueni, he hit his head on the ground, and he sustained injuries that required two months' hospitalization. Admin. Rec. 119-121, 140-141, 145-146 (Tr. 52-54, 73-74, 79-80). In the second incident, Evgueni was playing at a playground near a woman's laundry and occasionally touched it. The woman became angry, called Evgueni a "moron," and pushed Evgueni toward Tchoukhrova, telling her to take him away. He fell and hit his head, which required medical attention. Admin. Rec. 126-127, 141 (Tr. 59-60, 74). The parents filed police reports following both of those incidents, but the police did not investigate. Pet. App. 5a, 36a.

Tchoukhrova further asserted that, after she and her husband engaged in political action to pressure the Russian government to accord better treatment to disabled children, she was harassed, discriminated against, and threatened by local officials and members of the public. After a few years of political activity, the family left for the United States and entered as non-immigrant visitors. Pet. App. 6a-7a, 31a.

3. Victoria Tchoukhrova thereafter sought asylum and withholding of removal, and sought relief for her spouse and son as derivative applicants. Pet. App. 8a, 32a. She asserted persecution on the basis of political opinion—specifically, her opposition to the government's treatment of individuals with disabilities—and membership in a particular social group, identified as "a family with a child who has a debilitating disability known as cerebral palsy." *Id.* at 34a.

The immigration judge found the Tchoukhrovas to be removable and ineligible for asylum and withholding of removal. Pet. App. 30a-40a. The immigration judge found that Victoria Tchoukhrova and her family "did suffer harm in Russia" as a result of being members of a family with a child who has a debilitating disability. *Id.* at 37a. The immigration judge found, however, that the harms did not rise to the level of persecution. *Ibid.* With respect to Evgueni, the immigration judge reasoned that the "the facts in this case" indicate that "the Russian government does not have sufficient resources to provide adequate schooling for handicapped children" or "to provide medical attention to individuals at the same standards as in developed nations." *Id.* at 37a-38a; see also *id.* at 35a ("[T]he testimony clearly showed that her child did receive medical treatment. The respondent did not agree with the medical treatment given to her child."). With respect to Tchoukhrova's allegation that her husband was laid off from his job and that private individuals threw stones at her after she attended a meeting for families of children with disabilities, the immigration judge concluded that "[t]here was truly no connection between these incidents or harm and any of the grounds stated in the asylum statute." *Id.* at 37a.

Finally, although Tchoukhrova expressed concern about being killed or imprisoned if returned to Russia, the immigration judge found that her assertion "lacked any factual basis," that the family had lived in Russia "for a substantial period of time without being placed under arrest," that the family was allowed to live together and care for the child, and that she had been permitted to leave Russia three times to obtain medical treatment abroad for Evgueni. Pet. App. 39a. Thus,

while the immigration judge acknowledged the existence of discrimination against individuals with disabilities in Russia, he concluded that the "discrimination does not rise to the level of persecution," and "there has been no proof that either the respondent, her husband, or her child, suffered past persecution on account of any of the grounds stated in the asylum statute." *Ibid.*

The Board of Immigration Appeals affirmed in a brief order. Pet. App. 28a-29a. The Board explained that, "[w]hile the respondents present a very sympathetic family history," Victoria Tchoukhrova had failed to "adequately demonstrate[] that she was a victim of past persecution on account of political opinion or membership in a particular social group or that she has a well-founded fear or faces a clear probability of such persecution." *Id.* at 29a.

4. The court of appeals reversed, holding that Victoria Tchoukhrova is eligible for asylum and withholding of removal, and that her eligibility could extend derivatively to her child and spouse. Pet. App. 1a-27a. The court held that Tchoukhrova was eligible for asylum and qualified as a refugee based on her son's persecution, even if she had not herself been persecuted and was not independently eligible for asylum. The court held that federal immigration law required the immigration judge to "[i]mput[e] the disabled child's harms to the parent filing an application for asylum on behalf of the family," *id.* at 16a, and to apply the law as though "the parents and their disabled child incur the harm as a unit," *id.* at 14a.

In so doing, the court recognized that, while federal statutory law permits minor children to obtain asylum derivatively through their parents, "there is no compa-

rable provision permitting parents to obtain that relief derivatively through their minor children." Pet. App. 17a. The court also acknowledged that neither the Board nor the immigration judge "discuss[ed] the question expressly" of whether the harms suffered by a disabled child may be imputed to the parent. *Id.* at 15a. The court nevertheless chose to resolve that question and held that adopting a rule of child-to-parent imputation would "vindicate * * * basic principles and statutory purposes, and render[] the law consonant with both common sense and the important family values on which this nation prides itself." *Id.* at 16a-17a.[1]

The court of appeals next held that the record compelled the conclusion that Tchoukhrova's son, Evgueni, had suffered past persecution and faced a well-founded fear of future persecution. Pet. App. 19a-26a. From that finding, the court held that Victoria Tchoukhrova herself suffered persecution by imputation under its new rule, *id.* at 25a, and that this conclusion, in turn, triggered a regulatory presumption that Victoria Tchoukhrova also had a well-founded fear of future persecution, *ibid.*

The court refused to remand the case to the immigration judge to decide, in the first instance, whether that presumption could be rebutted by changed circum-

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[1] At oral argument, the panel questioned whether Tchoukhrova or her son should be treated as the principal asylum applicant. See United States Court of Appeals for the Ninth Circuit, *Media Access* <http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?> (Case No. 03-71129) (audio file of oral argument). After Tchoukhrova's counsel described the derivative asylum scheme permitting Tchoukhrova, as a parent, to give asylum to her child, but not to get asylum from her child, one member of the panel suggested that the law needed some type of "reverse-derivative" status running from the child to the parents. *Ibid.*

stances or the possibility of relocation within Russia. In the court's view, remand was not required because the government had not argued either of those issues before "the agency—or to us." Pet. App. 26a. The court instead held, de novo, that the "presumption has not been, and cannot be, rebutted." *Ibid.* The court accordingly held that Victoria Tchoukhrova was eligible for asylum and withholding of removal and that her son and spouse were derivatively eligible. The court remanded with directions that the Tchoukhrovas be granted withholding of removal and for a discretionary asylum determination. *Ibid.*

5. The court of appeals denied the government's petition for rehearing and for rehearing en banc. Pet. App. 41a. Seven judges dissented from the denial of rehearing en banc, explaining that, by imputing the harm suffered by a child to a parent, the panel "in effect creates a reverse derivative asylum claim—something expressly barred by 8 C.F.R. § 207.7(b)(6)." *Id.* at 42a (Kozinski, J., joined by O'Scannlain, Tallman, Rawlinson, Bybee, Callahan, and Bea, JJ.). The decision to adopt such a rule, the dissent explained, "presents a question of exceptional importance with profound implications for our nation's immigration laws." *Ibid.* Yet the panel's "exotic reading of the immigration statute was never discussed by the IJ, the BIA or even the parties—rather, it is something that the panel comes up with on its own." *Ibid.* That manner of proceeding, the dissent emphasized, squarely conflicts with this Court's precedent:

> In *INS* v. *Ventura*, 537 U.S. 12, 15-17 (2002) (per curiam) (summary reversal), the Supreme Court told us in no uncertain terms that the agency charged

> with administering the statute gets first crack at ruling on its construction. It has taken us less than three years to work our way around this rule.

Id. at 42a-43a.

Furthermore, the dissent noted, the "statute is quite specific that only the spouse and children of a principal applicant are entitled to derivative status" and "[p]arents are expressly not." Pet. App. 47a (citing 8 U.S.C. 1158(b)(3) (Supp. II 2002); 8 C.F.R. 207.7(b)(6)). The panel's "strained" reading of immigration law "moots this carefully drawn statutory scheme." *Ibid.*

The dissent also rejected the panel's assertion "that the agency, in fact, has already done this," concluding that "it is clear from the record that the agency did nothing of the sort." Pet. App. 48a-49a. The dissent pointed out that this "sea-change in our immigration laws" was, in the panel's own words, adopted "[w]ithout [the Board or immigration judge] discussing the question expressly," and the panel's suggestion that the agency had somehow endorsed its approach depended entirely on "a stray phrase in the IJ's oral decision, which [the panel] rips out of context." *Id.* at 16a, 49a. In the dissent's view, "[i]t strains credulity to suggest that the IJ and the BIA would have adopted such a sweeping change to the interpretation of the immigration statute without thinking long and hard about what they were doing." *Id.* at 42a.

Rather, the dissent determined, the panel's rule of reverse derivative asylum "is all very new law," Pet. App. 47a, on a legal question that Supreme Court precedent requires be remanded "so the agency can, in the first instance, rule on the inventive arguments adopted by the panel, arguments that were neither raised below

nor by any of the other parties on appeal," *id.* at 51a The dissent concluded that "this decision is nothing bu a big end-run around *Ventura*." *Ibid.*[2]

REASONS FOR GRANTING THE PETITION

1. The decision of the Ninth Circuit usurps the Executive Branch's statutorily assigned role in interpreting and enforcing the immigration laws, and its constitutionally assigned role in making the sensitive domestic and foreign-policy judgments that inhere in identifying which individuals may receive refuge in the United States. The court's decision is only the latest installment in a continuing pattern by the Ninth Circuit of defying the most basic rules for judicial review of agency action and disregarding this Court's specific direction to hew to precedent demarcating the court's proper role. See *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam) (summarily reversing the Ninth Circuit for resolving legal and factual questions in the first instance); see also *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) (unanimously reversing the Ninth Circuit for failing to defer to the Attorney General's interpretation of federal immigration law); 05-552 Pet. at 16-18, *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006) (cataloguing additional examples in the Ninth Circuit). And in this case, seven judges of that Circuit dissented from the denial of rehearing en banc because of the panel's refusal to remand, a point that the government brought to this Court's attention in *Thomas*, *supra*, as a further manifestation of the Ninth

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[2] The dissent also noted that the panel, in the course of its opinion, had "accept[ed] as true certain [factual] allegations" that were not "presented at the hearing and that the IJ had no opportunity to adjudicate." Pet. App. 43a n.1.

Circuit's failure to follow *Ventura*. See 05-552 Reply Br. Pet. Stage at 1-2.

Three weeks ago, in *Thomas*, this Court summarily reversed an en banc decision of the Ninth Circuit for committing the same error that occurred here. The Court held that the Ninth Circuit "clearly violate[d]" the "ordinary remand rule" by deciding, in the first instance, that particular members of a family constituted a "particular social group" for purposes of the INA's definition of "refugee." 126 S. Ct. at 1614, 1615. The Court explained that the court of appeals' error was "'obvious in light of *Ventura*,' itself a summary reversal." *Id.* at 1614.

In so holding, this Court reiterated and reemphasized its holding in *Ventura* that, "[w]ithin broad limits," federal immigration law "entrusts the agency to make the basic asylum eligibility decision." *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16). "A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *Ibid.* (quoting *Ventura*, 537 U.S. at 16, and *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985)). Rather, "the function of the reviewing court ends when an error of law is laid bare." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). At that juncture, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16, and *Florida Power & Light*, 470 U.S. at 744). A "judicial judgment cannot be made to do service for an administrative judgment." *Ibid.* (quoting *Ventura*, 537

U.S. at 16, and *SEC* v. *Chenery Corp.*, 318 U.S. 80, 8[illegible] (1943)).

Here, as in *Thomas*, the Ninth Circuit has reached out to create a new rule of immigration law that permits individuals to qualify for asylum and withholding of removal without personally being subjected to any persecution, through imputation of a child's persecution to a parent. The court's opinion confesses that it did so without the expert agency "discussing the question expressly." Pet. App. 15a. Indeed, as the dissent accurately noted, the panel created a rule of reverse derivative asylum without that argument even being raised by the parties. *Id.* at 42a.[3]

It therefore is clear here, as it was in *Thomas* and *Ventura*, that the court of appeals "should have applied the 'ordinary "remand" rule,'" *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 18), and allowed the Board to decide, in the first instance, whether harms suffered by a child may be imputed to a parent as perse-

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[3] The panel asserted that it was only affirming the implicit position taken by the immigration judge and the Board below. See Pet. App. 11a, 19a. However, as the dissent noted, "the fact is, the IJ and the BIA did nothing like what the panel attributes to them; they'd surely be shocked at the suggestion that they did." *Id.* at 56a. The immigration judge's decision addressed and turned upon Victoria Tchoukhrova's claim that she had suffered political persecution. The immigration judge never held that alleged acts of persecution targeted at Evgueni could be imputed to his mother or deemed to be a form of persecution of the mother herself, nor did the immigration judge suggest that any form of derivative withholding of removal existed in the law. The Board, moreover, made clear that the only relevant question was whether the "lead respondent"—Victoria Tchoukhrova—had "adequately demonstrated that *she* was a victim of past persecution" on prohibited grounds or that "*she* has a well-founded fear or clear probability of such persecution." *Id.* at 29a (emphases added).

cution. Instead, the court proceeded to resolve that threshold legal question definitively, thereby establishing circuit-wide precedent.

2. The Ninth Circuit did not stop there. The court next held that the record compelled the conclusion that Evgueni had been subjected to "persecution" within the meaning of the Act, relying on unsubstantiated allegations in the record that the immigration judge did not rely upon in finding no persecution,[4] and ignoring other portions of the record in critical respects.[5] And the

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[4] For example, although the panel stated that Evgueni was treated as "medical waste" after he was born, see Pet. App. 3a, 20a, the immigration judge made no finding about that allegation, which was made only in passing in one of Tchoukhrova's two asylum applications, see Admin. Rec. 201, and was not mentioned as a basis for a claim of persecution in Tchoukhrova's pre-hearing statement of facts submitted to the immigration judge, *id.* at 170-187, her testimony at the hearing, or her brief on appeal to the Board, *id.* at 21-38. She therefore did not exhaust her remedies on any such claim, as required by 8 U.S.C. 1252(d)(1). See Pet. App. 43a n.1 (Kozinski, J., dissenting from denial of rehearing en banc).

The court of appeals also relied on the two physical incidents described at pp. 7-8, *supra*. See Pet. App. 24a-25a. The court faulted the immigration judge for ignoring those incidents in his analysis of whether persecution had occurred, *id.* at 24a. (The immigration judge had referred to them in his findings of fact, see *id.* at 36a.) But instead of remanding to allow the Board or the immigration judge to determine in the first instance whether those incidents involving private individuals constituted persecution, the court relied on them itself in finding persecution.

[5] For example, the court concluded that Evgueni was subjected to persecution because he had "significantly circumscribed" medical care. Pet. App. 23a-24a. The immigration judge concluded, however, that "the testimony clearly showed that [Evgueni] did receive medical treatment," and observed that Tchoukhrova simply believed that her child was not being treated under normal standards of treatment given to children with cerebral palsy, *id.* at 35a; see, *e.g.*, Admin. Rec. 113 (Tr.

court then went on to hold both that the persecution i found and imputed to Evgueni's mother gave rise to presumption that Tchoukhrova has a well-founded fea of future persecution, Pet. App. 25a, and that the agenc could not rebut that presumption with evidence o changed circumstances or an ability to relocate in ternally, *id.* at 26a. In so holding, the court acknowl edged that those issues had not been addressed by th agency, noting that "the immigration judge did not ap ply the [well-founded fear] presumption" and "did no consider whether the INS met its rebuttal burden." *Id* at 25a. The court nevertheless considered it appropriate

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46). The court of appeals did not point to any basis for concluding that the evidence compelled a contrary conclusion, see *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992); 8 U.S.C. 1252(b)(4)(B)—much less that the nature of the medical care made available by the government to Evgueni while he was in the custody of his parents and had access to private medical care constituted affirmative persecution by the government. The court similarly found persecution because, it asserted, Evgueni was denied the right to an elementary education, Pet. App. 23a-24a, but the government in fact afforded Evgueni home instruction, Admin. Rec. 333.

The court also concluded that Evgueni had been subjected to persecution because he was placed in an "*internaty*," over his parents' objection, during the first two months of his life. Pet App. 20a-23a. An internaty is an orphanage for "abandoned" orphans from 5 to 17 years old who have been diagnosed as "uneducable" because of severe mental impairment. Admin. Rec. 258, 267. As the dissenters from the denial of rehearing en banc explained (Pet. App. 48a n.2), Tchoukhrova testified and the immigration judge found that Evgueni was placed in a government hospital, not an internaty. See *id.* at 34a; Admin. Rec. 56, 95 (Tr. 28). And when Evgueni's parents were able to remove him from that facility, they placed him in a private hospital, Admin. Rec. 100 (Tr. 33), thereby recognizing that placement in a hospital was necessary.

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to address and conclusively resolve those issues de novo. *Id.* at 25a-26a.

The court thus multiplied the *Thomas/Ventura* violation that occurred in this case. What is more, the failure to permit the agency to address the question of changed circumstances in the first instance was the *exact same* legal error that prompted summary reversal in *Ventura* itself, see 537 U.S. at 15-16. Here, as in *Ventura*, "remand could lead to the presentation of further evidence of current circumstances," *id.* at 18—concerning both (i) Evgueni's present condition and enhanced capabilities, now that he is 15 years old and has had the benefit of treatment in the United States, and (ii) how someone in his circumstances might fare in Russia today. The court of appeals had no authority to cut off the ability of the Board to inquire into those matters.

The court's only proffered reason for not remanding on the rebuttal issue was that the government had "made no argument to the agency—or to us—that there has been a fundamental change in circumstances or a possibility of relocation." Pet. App. 26a. But that is a manifestation of a "*Ventura* problem," not an excuse for ignoring *Ventura*. The government did not litigate the question of changed circumstances or internal relocation before the immigration judge or the Board because the immigration judge found that no persecution occurred, so there was nothing to rebut. And the government did not "argu[e]" the merits of those issues for the first time in the Ninth Circuit because that court had no authority to decide those questions in the first instance under this Court's clear teaching. See *Ventura*, *supra;* see also *Thomas*, *supra*. The government did argue that, if the court reversed the immigration judge's finding of no

persecution, the court should remand the remainin unaddressed issues to the Board. See Gov't C.A. Br. 28 30 (citing, *inter alia*, *Ventura*). But that was to no avail The Ninth Circuit instead brought its pattern of disre gard for "the ordinary remand rule," *Thomas*, 126 S. Ct at 1615, full circle, with the court asserting the govern ment's lack of complicity in a *Ventura* violation as the rationale for committing its *Ventura* violation.

3. The question of whether a parent is eligible for asylum and withholding of removal solely by imputation, and without establishing any past or future persecution of the parent in her own right, is of considerable significance in the administration of the immigration laws. The Ninth Circuit's judicially crafted rule of asylum eligibility ignores that derivative asylum claims fall within a narrow, statutorily delineated exception, 8 U.S.C. 1158(b)(3) (Supp. II 2002), to the general rule that persecution must be personal and individualized. Indeed, the court's rule flatly contradicts an agency regulation that specifically forbids the child-to-parent derivation of asylum. See 8 C.F.R. 207.7(b)(6). The court's new eligibility rule also runs roughshod over the longstanding statutory and regulatory declination to permit *any* form of derivative eligibility for withholding of removal. See Pet. App. 42a (dissent from denial of rehearing en banc) (stressing that the court's decision reached out to decide unilaterally "a question of exceptional importance with profound implications for our nation's immigration laws").

Beyond that, the court's rule was adopted without any consideration of the potential practical consequences of adopting a rule of derivative asylum and withholding eligibility that turns upon harm to children,

given that not every country or culture views children with the same solicitude and protective outlook as this Nation does. It is one thing to let adults who have personally endured persecution keep their otherwise helpless children with them; it is quite another thing to make the hardship of children the pathway to immigration relief for self-sufficient adults. Those types of "highly complex and sensitive" cultural assessments and acutely sensitive sociological and foreign policy judgments, *Ventura*, 537 U.S. at 17, are the province of the Executive Branch, not the courts. See *Aguirre-Aguirre*, 526 U.S. at 425 ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'") (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988)). Those considerations underscore why the court of appeals should have remanded to the Board to decide that question (along with any remaining issues in the case), rather than doing so itself in the first instance.

Moreover, the Ninth Circuit focused on the difficulty of dividing parents from their minor children when the child is the primary asylum applicant as a justification for adopting its rule of reverse derivative asylum, while ignoring other options already available to address such difficulties. Simply put, the interest in avoiding the division of families does not require granting asylum to all members of the family, including those who do not themselves suffer persecution. In practice, as this Court has noted, "the Executive has discretion" to abandon removal efforts or to stay execution of a removal order, and for years "ha[s] been engaging in a regular practice (which has come to be known as 'deferred ac-

tion') of exercising that discretion for humanitarian rea sons." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-484 (1999); see, *e.g.*, 8 C.F.R 241.6. The immigration judge himself suggested tha deferred action by the INS (now, the Secretary) woul be the proper means for addressing the humanitarian concerns raised by the situation of Evgueni and his family. Admin. Rec. 131 (Tr. 64). That approach can avoid dividing families without granting asylum or mandatory withholding of removal to parents who have not themselves suffered persecution. The weighing of the policy considerations implicated by alternative means of maintaining family units, while reserving asylum and withholding of removal for applicants who satisfy the criteria that Congress has specified, is a matter best left to the expert agency in the first instance. See *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 483-484.

4. In light of this Court's recent summary reversal of the Ninth Circuit in *Thomas* for committing the same failure-to-remand error, the Court should, at a minimum, grant the government's petition, vacate the judgment below, and remand for reconsideration in light of *Thomas*. In the government's view, however, the better course is to summarily reverse the decision of the Ninth Circuit in this case as well.

This panel has already had multiple opportunities to consider and reconsider whether it should have remanded this case rather than create new immigration law out of whole cloth. The government briefed the remand issue to the panel at some length. See Gov't C.A. Br. 28-30. The panel was fully aware of *Ventura*, citing it twice, albeit while giving it the back of its hand. Pet. App. 10a n.3, 26a. The government sought panel and en

banc rehearing based on the court's *Ventura* violation. See Gov't Reh'g Pet. 13-17. But the panel denied rehearing, Pet. App. 41a, notwithstanding the lengthy and vigorous dissent of seven members of the court on *Ventura* grounds. *Id.* at 42a-51a. There is no sound reason why the panel should be afforded yet another opportunity to do what this Court made clear in *Ventura* it should have done in the first place.

Accordingly, the decision of the Ninth Circuit so far departs from this Court's precedent and established principles of administrative law and deference on matters of immigration policy as to warrant this Court's review. Indeed, the court's error is just as obvious as it was in *Thomas*, so that summary reversal is appropriate.

CONCLUSION

The petition for a writ of certiorari should b granted and the judgment of the court of appeal summarily reversed. In the alternative, the petitio should be granted, the judgment of the court of appeal vacated, and the case remanded for further consider ation in light of *Gonzales* v. *Thomas*, 126 S. Ct. 161 (2006).

Respectfully submitted.

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